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15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA

17 SAN FRANCISCO DIVISION

18
19 SYMYX TECHNOLOGIES, INC., a
Delaware Corporation,

20 Plaintiff,

21 vs.

22 INTEMATIX CORPORATION, a California
23 Corporation,

24 Defendant.

CASE NO. C 06-03276 MHP

~~PROPOSED~~ STIPULATED
PROTECTIVE ORDER

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of
3 confidential, proprietary, or private information for which special protection from public
4 disclosure and from use for any purpose other than prosecuting this litigation would be warranted.
5 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated
6 Protective Order. The parties acknowledge that this Order does not confer blanket protections on
7 all disclosures or responses to discovery and that the protection it affords extends only to the
8 limited information or items that are entitled under the applicable legal principles to treatment as
9 confidential. The parties further acknowledge, as set forth in Section 10, below, that this
10 Stipulated Protective Order creates no entitlement to file confidential information under seal; Civil
11 Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards that will
12 be applied when a party seeks permission from the court to file material under seal.

13 2. DEFINITIONS

14 2.1 Party: any party to this action, including all of its officers, directors, employees,
15 consultants, retained experts, and outside counsel (and their support staff).

16 2.2 Disclosure or Discovery Material: all items or information, regardless of the
17 medium or manner generated, stored, or maintained (including, among other things, testimony,
18 transcripts, or tangible things) that are produced or generated in disclosures or responses to
19 discovery in this matter.

20 2.3 "Confidential" Information or Items: information (regardless of how generated,
21 stored or maintained) or tangible things that qualify for protection under standards developed
22 under Fed. R. Civ. Pro. 26(c).

23 2.4 "Highly Confidential – Attorneys' Eyes Only" Information or Items: extremely
24 sensitive "Confidential Information or Items" whose disclosure to another Party or non-party
25 would create a substantial risk of serious injury that could not be avoided by less restrictive means.

26 2.5 Receiving Party: a Party that receives Disclosure or Discovery Material from a
27 Producing Party.
28

2.6 Producing Party: a Party or non-party that produces Disclosure or Discovery Material in this action.

2.7. Designating Party: a Party or non-party that designates information or items that it produces in disclosures or in responses to discovery as “Confidential” or “Highly Confidential — Attorneys’ Eyes Only.”

2.8 Protected Material: any Disclosure or Discovery Material that is designated as “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.”

2.9. Outside Counsel: attorneys who are not employees of a Party but who are retained to represent or advise a Party in this action.

2.10 House Counsel: attorneys who are employees of a Party.

2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as well as their support staffs).

2.12 Expert: a person with specialized knowledge or experience in a matter pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a consultant in this action and who is not a past or a current employee of a Party or of a competitor of a Party and who, at the time of retention, is not anticipated to become an employee of a Party or a competitor of a Party. This definition includes a professional jury or trial consultant retained in connection with this litigation.

2.13 Professional Vendors: persons or entities that provide litigation support services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and their employees and subcontractors.

3. SCOPE

The protections conferred by this Stipulation and Order cover not only Protected Material (as defined above), but also any information copied or extracted therefrom, as well as all copies, excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by parties or counsel to or in court or in other settings that might reveal Protected Material.

1 4. DURATION

2 Even after the termination of this litigation, the confidentiality obligations imposed by this
3 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order
4 otherwise directs.

5 5. DESIGNATING PROTECTED MATERIAL

6 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party
7 or non-party that designates information or items for protection under this Order must take care to
8 limit any such designation to specific material that qualifies under the appropriate standards. A
9 Designating Party must take care to designate for protection only those parts of material,
10 documents, items, or oral or written communications that qualify – so that other portions of the
11 material, documents, items, or communications for which protection is not warranted are not
12 swept unjustifiably within the ambit of this Order.

13 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
14 shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to
15 unnecessarily encumber or retard the case development process, or to impose unnecessary
16 expenses and burdens on other parties), expose the Designating Party to sanctions.

17 If it comes to a Party's or a non-party's attention that information or items that it
18 designated for protection do not qualify for protection at all, or do not qualify for the level of
19 protection initially asserted, that Party or non-party must promptly notify all other parties that it is
20 withdrawing the mistaken designation

21 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order
22 (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,
23 material that qualifies for protection under this Order must be clearly so designated before the
24 material is disclosed or produced.

25 Designation in conformity with this Order requires:

26 (a) for information in documentary form (apart from transcripts of depositions or
27 other pretrial or trial proceedings), that the Producing Party affix the legend "CONFIDENTIAL"
28 or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" on each page that contains

1 protected material. If only a portion or portions of the material on a page qualifies for protection,
2 the Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
3 markings in the margins) and must specify, for each portion, the level of protection being asserted
4 (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

5 A Party or non-party that makes original documents or materials available for inspection
6 need not designate them for protection until after the inspecting Party has indicated which material
7 it would like copied and produced. During the inspection and before the designation, all of the
8 material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –
9 ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants
10 copied and produced, the Producing Party must determine which documents, or portions thereof,
11 qualify for protection under this Order. Then, before producing the specified documents, the
12 Producing Party must affix the appropriate legend (“CONFIDENTIAL” or “HIGHLY
13 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) on each page that contains Protected
14 Material. If only a portion or portions of the material on a page qualifies for protection, the
15 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
16 markings in the margins) and must specify, for each portion, the level of protection being asserted
17 (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

18 (b) for testimony given in deposition or in other pretrial or trial proceedings, that
19 the Party or non-party offering or sponsoring the testimony identify on the record, before the close
20 of the deposition, hearing, or other proceeding, all protected testimony, and further specify any
21 portions of the testimony that qualify as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
22 ONLY.” When it is impractical to identify separately each portion of testimony that is entitled to
23 protection, and when it appears that substantial portions of the testimony may qualify for
24 protection, the Party or non-party that sponsors, offers, or gives the testimony may invoke on the
25 record (before the deposition or proceeding is concluded) a right to have up to twenty (20) days to
26 identify the specific portions of the testimony as to which protection is sought and to specify the
27 level of protection being asserted (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
28 ATTORNEYS’ EYES ONLY”). Only those portions of the testimony that are appropriately

1 designated for protection within the twenty (20) days shall be covered by the provisions of this
2 Stipulated Protective Order.

3 Transcript pages containing Protected Material must be separately bound by the court
4 reporter, who must affix on each such page the legend "CONFIDENTIAL" or "HIGHLY
5 CONFIDENTIAL – ATTORNEYS' EYES ONLY," as instructed by the Party or non-party
6 offering or sponsoring the witness or presenting the testimony.

7 (c) for information produced in some form other than documentary, and for any
8 other tangible items, that the Producing Party affix in a prominent place on the exterior of the
9 container or containers in which the information or item is stored the legend "CONFIDENTIAL"
10 or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." If only portions of the
11 information or item warrant protection, the Producing Party, to the extent practicable, shall
12 identify the protected portions, specifying whether they qualify as "Confidential" or as "Highly
13 Confidential – Attorneys' Eyes Only."

14 5.3 Inadvertent Failures to Designate. Notwithstanding Section 5.2 above, if timely
15 corrected, an inadvertent failure to designate qualified information or items as "Confidential" or
16 "Highly Confidential – Attorneys' Eyes Only" does not, standing alone, waive the Designating
17 Party's right to secure protection under this Order for such material. If material is appropriately
18 designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only" after the material
19 was initially produced, the Receiving Party, on timely notification of the designation, must make
20 reasonable efforts to assure that the material is treated in accordance with the provisions of this
21 Order.

22 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

23 6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party's
24 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
25 economic burdens, or a later significant disruption or delay of the litigation, a Party does not
26 waive its right to challenge a confidentiality designation by electing not to mount a challenge
27 promptly after the original designation is disclosed.

1 6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating
 2 Party's confidentiality designation must do so in good faith and must begin the process by
 3 conferring directly (in voice to voice dialogue; other forms of communication are not sufficient)
 4 with counsel for the Designating Party. In conferring, the challenging Party must explain the basis
 5 for its belief that the confidentiality designation was not proper and must give the Designating
 6 Party an opportunity to review the designated material, to reconsider the circumstances, and, if no
 7 change in designation is offered, to explain the basis for the chosen designation. A challenging
 8 Party may proceed to the next stage of the challenge process only if it has engaged in this meet
 9 and confer process first.

10 6.3 Judicial Intervention. A Party that elects to press a challenge to a confidentiality
 11 designation after considering the justification offered by the Designating Party may file and serve
 12 a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable)
 13 that identifies the challenged material and sets forth in detail the basis for the challenge. Each
 14 such motion must be accompanied by a competent declaration that affirms that the movant has
 15 complied with the meet and confer requirements imposed in the preceding paragraph, and that sets
 16 forth with specificity the justification for the confidentiality designation that was given by the
 17 Designating Party in the meet and confer dialogue. The burden of persuasion in any such
 18 challenge proceeding shall be on the Designating Party. Until the court rules on the challenge, all
 19 parties shall continue to afford the material in question the level of protection to which it is
 20 entitled under the Producing Party's designation.

21 7. ACCESS TO AND USE OF PROTECTED MATERIAL

22 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or
 23 produced by another Party or by a non-party in connection with this case only for prosecuting,
 24 defending, or attempting to settle pending litigation involving the parties, including this action, as
 25 well as *Intematix v. Symyx, et al.*, (Alameda County Superior Court, Case No., RG 06273044).
 26 Such Protected Material may be disclosed only to the categories of persons and under the
 27 conditions described in this Order. When the pending litigations have been terminated, a
 28 Receiving Party must comply with the provisions of section 11, below (FINAL DISPOSITION).

1 Protected Material must be stored and maintained by a Receiving Party at a location and in
2 a secure manner that ensures that access is limited to the persons authorized under this Order.

3 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered
4 by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any
5 information or item designated CONFIDENTIAL only to:

6 (a) the Receiving Party's Outside Counsel of record in this action, as well as
7 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
8 litigation;

9 (b) the officers, directors, and employees (including House Counsel) of the
10 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have
11 signed the "Agreement to Be Bound by Protective Order" (Exhibit A);

12 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is
13 reasonably necessary for this litigation and who have signed the "Agreement to Be Bound by
14 Protective Order" (Exhibit A);

15 (d) the Court and its personnel;

16 (e) court reporters, their staffs, and Professional Vendors to whom disclosure is
17 reasonably necessary for this litigation;

18 (f) the author of the document or the original source of the information.

19 7.3 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"
20 Information or Items. Unless otherwise ordered by the court or permitted in writing by the
21 Designating Party, a Receiving Party may disclose any information or item designated "HIGHLY
22 CONFIDENTIAL – ATTORNEYS' EYES ONLY" only to:

23 (a) the Receiving Party's Outside Counsel of record in this action, as well as
24 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
25 litigation;

26 (b) one House Counsel of the Receiving Party to whom disclosure is reasonably
27 necessary for this litigation and who has signed the "Agreement to Be Bound by Protective Order"
28 (Exhibit A);

(c) Experts (as defined in this Order) (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the “Agreement to Be Bound by Protective Order” (Exhibit A), and (3) as to whom the procedures set forth in Paragraph 7.4, below, have been followed;

(d) the Court and its personnel;

(e) court reporters, their staffs, and Professional Vendors to whom disclosure is reasonably necessary for this litigation; and

(f) the author of the document or the original source of the information.

7.4 Procedures for Approving Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or Items to “Experts”

(a) Unless otherwise ordered by the court or agreed in writing by the Designating Party, a Party that seeks to disclose to an “Expert” (as defined in this Order) any information or item that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” first must make a written request to the Designating Party that (1) identifies the specific HIGHLY CONFIDENTIAL information that the Receiving Party seeks permission to disclose to the Expert, (2) sets forth the full name of the Expert and the city and state of his or her primary residence, (3) attaches a copy of the Expert’s current resume, (4) identifies the Expert’s current employer(s), (5) identifies each person or entity from whom the Expert has received compensation for work in his or her areas of expertise or to whom the expert has provided professional services at any time during the preceding five years, and (6) identifies (by name and number of the case, filing date, and location of court) any litigation in connection with which the Expert has provided any professional services during the preceding five years.

(b) A Party that makes a request and provides the information specified in the preceding paragraph may disclose the subject Protected Material to the identified Expert unless, within seven court days of delivering the request, the Party receives a written objection from the Designating Party. Any such objection must set forth in detail the grounds on which it is based.

(c) A Party that receives a timely written objection must meet and confer with the Designating Party (through direct voice to voice dialogue) to try to resolve the matter by

1 agreement. If no agreement is reached, the Party seeking to make the disclosure to the Expert may
2 file a motion as provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if
3 applicable) seeking permission from the court to do so. Any such motion must describe the
4 circumstances with specificity, set forth in detail the reasons for which the disclosure to the Expert
5 is reasonably necessary, assess the risk of harm that the disclosure would entail and suggest any
6 additional means that might be used to reduce that risk. In addition, any such motion must be
7 accompanied by a competent declaration in which the movant describes the parties' efforts to
8 resolve the matter by agreement (i.e., the extent and the content of the meet and confer
9 discussions) and sets forth the reasons advanced by the Designating Party for its refusal to approve
10 the disclosure.

11 In any such proceeding, the Party opposing disclosure to the Expert shall bear the
12 burden of proving that the risk of harm that the disclosure would entail (under the safeguards
13 proposed) outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

14 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER
15 LITIGATION.

16 If a Receiving Party is served with a subpoena or an order issued in other litigation that
17 would compel disclosure of any information or items designated in this action as
18 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," the
19 Receiving Party must so notify the Designating Party, in writing immediately and in no event
20 more than three (3) court days after receiving the subpoena or order. Such notification must
21 include a copy of the subpoena or court order.

22 The Receiving Party also must immediately inform in writing the Party who caused the
23 subpoena or order to issue in the other litigation that some or all the material covered by the
24 subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must
25 deliver a copy of this Stipulated Protective Order promptly to the Party in the other action that
26 caused the subpoena or order to issue.

27 The purpose of imposing these duties is to alert the interested parties to the existence of
28 this Protective Order and to afford the Designating Party in this case an opportunity to try to

1 protect its confidentiality interests in the court from which the subpoena or order issued. The
2 Designating Party shall bear the burdens and the expenses of seeking protection in that court of its
3 confidential material – and nothing in these provisions should be construed as authorizing or
4 encouraging a Receiving Party in this action to disobey a lawful directive from another court.

5 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

6 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
7 Material to any person or in any circumstance not authorized under this Stipulated Protective
8 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the
9 unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material,
10 (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of
11 this Order, and (d) request such person or persons to execute the “Acknowledgment and
12 Agreement to Be Bound” that is attached hereto as Exhibit A.

13 10. FILING PROTECTED MATERIAL. Without written permission from the Designating
14 Party or a court order secured after appropriate notice to all interested persons, a Party may not file
15 in the public record in this action any Protected Material. A Party that seeks to file under seal any
16 Protected Material must comply with Civil Local Rule 79-5.

17 11. FINAL DISPOSITION. Unless otherwise ordered or agreed in writing by the Producing
18 Party, within sixty (60) days after the final termination of this and any pending action between the
19 parties, each Receiving Party must return all Protected Material to the Producing Party. As used
20 in this subdivision, “all Protected Material” includes all copies, abstracts, compilations, summaries
21 or any other form of reproducing or capturing any of the Protected Material.

22 Whether the Protected Material is returned or destroyed, the Receiving Party must submit a
23 written certification to the Producing Party (and, if not the same person or entity, to the
24 Designating Party) by the sixty (60) day deadline that identifies (by category, where appropriate)
25 all the Protected Material that was returned or destroyed and that affirms that the Receiving Party
26 has not retained any copies, abstracts, compilations, summaries or other forms of reproducing or
27 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to
28 retain an archival copy of all pleadings, motion papers, transcripts, legal memoranda,

1 correspondence or attorney work product, even if such materials contain Protected Material. Any
 2 such archival copies that contain or constitute Protected Material remain subject to this Protective
 3 Order as set forth in Section 4 (DURATION) above.

4 12. MISCELLANEOUS

5 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to
 6 seek its modification by the Court in the future.

7 12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective
 8 Order no Party waives any right it otherwise would have to object to disclosing or producing any
 9 information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no
 10 Party waives any right to object on any ground to use in evidence of any of the material covered
 11 by this Protective Order.

12 12.3 Other Actions Between Parties. This Order does not bar the discovery or use of
 13 Protected Material produced or generated in disclosures or responses to discovery in this matter by
 14 any party to the co-pending *Intematix v. Symyx, et al.*, (Alameda County Superior Court, Case No.,
 15 RG 06273044).

16
 17 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

18 Dated: September 27, 2006

QUINN EMANUEL URQUHART
 OLIVER & HEDGES, LLP

20 /s/ Todd M. Briggs

Todd M. Briggs
 Attorneys for Plaintiff
 Symyx Technologies, Inc.

24 Dated: September 27, 2006

MANATT, PHELPS & PHILLIPS, LLP

26 /s/ Todd M. Briggs for

Christopher L. Wanger
 Attorneys for Defendant & Counterclaimant
 Intematix Corporation

1 I, Todd M. Briggs, am the ECF User whose identification and password are being used to
2 file this document. Pursuant to General Order 45.X.B, I hereby attest that Christopher L. Wanger,
3 counsel for Intematix, has concurred in this filing.
4
5

6 **PURSUANT TO STIPULATION, IT IS SO ORDERED.** SUBJECT TO ATTACHED SUPPLE-
7 **MENTAL ORDER.**

8 Dated: September 28, 2006



EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
[print or type full address], declare under penalty of perjury that I have read in its entirety and
understand the Stipulated Protective Order that was issued by the United States District Court for
the Northern District of California on _____ [date] in the case of *Symyx v. Intematix*,
CASE NO. C 06-03276 MHP I agree to comply with and to be bound by all the terms of this
Stipulated Protective Order and I understand and acknowledge that failure to so comply could
expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will
not disclose in any manner any information or item that is subject to this Stipulated Protective
Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
Northern District of California for the purpose of enforcing the terms of this Stipulated Protective
Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and telephone
number] as my California agent for service of process in connection with this action or any
proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____